WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER, 2012

PLEASE NOTE: The cases below scheduled for Nov. 5 will be heard at the Green County Justice Center as part of the Supreme Court's *Justice on Wheels* program. The Green County Justice Center is located at 2841 Sixth St., Monroe. Cases scheduled for Nov. 6 will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Dane
Milwaukee
Monroe
Racine
Wood

MONDAY, NOVEMBER 5, 2012 (MONROE)

9:30 a.m.	10AP2003-CR	-	State v. Courtney C. Beamon
11:00 a.m.	12AP544-W	-	Office of the State Public Defender v. Court of Appeals, District IV

TUESDAY, NOVEMBER 6, 2012 (MADISON)

9:45 a.m.	09AP2432	-	Acuity v. Society Insurance
10:45 a.m.	11AP914	-	Estate of Danny L. Hopgood v. Jimmy D. Boyd
1:30 p.m.	09AP284-D	-	Office of Lawyer Regulation v. Alan D. Eisenberg

In addition to the cases listed above, the following case is assigned for decision without oral argument, based upon the submission of briefs:

11AP478-D - Office of Lawyer Regulation v. Benjamin J. Harris

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

If any special access, visual or hearing arrangements are necessary for your attendance, please advise the Clerk's Office by phone or send an e-mail message in advance to clerk@wicourts.gov

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
MONDAY, NOVEMBER 5, 2012
9:30 a.m. (Monroe)

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Racine County Circuit Court decision, Judge Emily S. Mueller, presiding.

2010AP2003-CR State v. Beamon

This criminal case, which involves charges of fleeing and eluding an officer, examines whether the sufficiency of the evidence used to convict someone should be measured against the instructions actually given to the jury, or against the statutory elements of the crime.

Some background: At approximately 12:45 a.m. on Nov. 19, 2007, two off-duty Racine police officers heard gunshots while working security at the American Legion Bar. While investigating the source of the shots, one officer heard additional shots and saw someone leave a porch and get into a vehicle that drove away. The officer described the vehicle to police dispatch, and an officer in a squad car began to follow the suspect vehicle, which did not have its headlights on.

The vehicle did not slow down or yield after the activation of the squad car's lights and siren, and proceeded through an intersection with a stop sign without slowing down. After passing through the intersection, the driver's door opened and the driver rolled out. The driverless vehicle continued rolling down the street until it crashed into a parked vehicle. The individual who rolled out of the vehicle and was subsequently caught by the police was Courtney C. Beamon.

The state ultimately charged Beamon with eight separate criminal counts, all as a habitual offender. A jury found Beamon guilty of all eight counts. The only count that Beamon challenged on appeal was the count that charged him with fleeing or eluding an officer, in violation of Wis. Stat. § 346.04(3).

Beamon asserted that, under the instructions given to the jury, the state had to prove that he had increased the speed of his vehicle to flee. Since there was no evidence that he had ever increased his speed, he asserted that the state had failed to provide sufficient evidence on that element of the offense. He argued that the jury instructions, as given, provide the law of the case and govern the review of the sufficiency of the evidence.

Beamon asserted that this rule of sufficiency review was mandated by the Supreme Court's relatively recent decision in a civil case. See D.L. Anderson's Lakeside Leisure Co. v. Anderson, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803 ("a challenge to the sufficiency of the evidence is evaluated in light of the jury instructions").

The state argued, and the Court of Appeals agreed, that the evidence should be evaluated in light of the statutory elements of the offense, not the instructions actually given to the jury.

The Court of Appeals viewed the jury instruction as containing an extra element (increasing speed) that was not necessary to the jury's verdict. It therefore looked to the harmless error rule adopted by the Supreme Court in State v. Harvey, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189, which provides that "[a] constitutional or other error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"

The Court of Appeals determined that the evidence was strong enough that "it is clear beyond a reasonable doubt that a rational jury would have found [Beamon] guilty absent the error." The Court of Appeals pointed out, among other things, that while police pursued Beamon with squad lights and siren activated, Beamon drove 45-50 miles per hour in a 30 mile-per-hour zone at night with his lights off. Moreover, Beamon drove through a stop sign and rolled out of the car, leaving it to crash into a parked vehicle. The Court of Appeals concluded that this evidence met the statutory elements.

A decision by the Supreme Court could clarify how sufficiency reviews should be performed – by measuring the evidence against the instructions as actually given or against the information (i.e., the charging document) or against the statute defining the offense.

WISCONSIN SUPREME COURT
MONDAY, NOVEMBER 5, 2012
11:00 a.m. (Monroe)

This is a petition for supervisory writ, which is simply a type of order. A person may request the Supreme Court to issue a supervisory order to a lower court and the judge presiding therein under certain circumstances. See Wis. Stat. §§ 809.51 and 809.71. In this case, the State Public Defender has asked the Supreme Court to review a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) and to order the Court of Appeals to take certain actions. The underlying case originated in Wood County Circuit Court, Judge James M. Mason, presiding.

2012AP544-W State Public Def. v. COA, Dist. IV

In this case, the Supreme Court will hear arguments on whether post-conviction/appellate defense counsel must obtain permission from a circuit court to access, cite to, or discuss the contents of a pre-sentence investigation report (PSI) in a post-conviction or appellate brief or hearing.

The State Public Defender (SPD) has asked the Supreme Court to issue a supervisory writ, ordering the Court of Appeals to allow counsel for a criminal defendant to access, cite to, and discuss the PSI in appellate briefs without first obtaining permission from the circuit court. A decision by the Supreme Court is expected to clarify the law and help judges and lawyers handling future criminal cases.

Some background: The SPD's writ petition was filed in response to District IV Court of Appeals' order denying the SPD's and the state's motions for authorization from the Court of Appeals to cite and discuss Michael Buchanan's PSI in his criminal appeal.

Buchanan had pled no contest to one count of first-degree sexual assault of a child and one count of child enticement, both with a dangerous weapon modifier. Prior to sentencing Buchanan filed a motion to strike certain parts of the PSI. The circuit court granted the motion in part and denied it in part. The court then imposed consecutive sentences of 25 years and 15 years.

Assistant SPD Steven Grunder was appointed to represent Buchanan on appeal. The SPD's writ petition states that Grunder filed a motion with the Court of Appeals asking for authorization to cite parts of the PSI, although the SPD asserts that such a motion was unnecessary. The motion asserted that Buchanan would need to include excerpts of the PSI in his appellate brief in order to present his claims on appeal. The motion further stated that the excerpted portions would contain no confidential information about the victim or the victim's family and that Buchanan's brief would refer to sources of information in the PSI only by their initials.

On Nov. 30, 2011, the Court of Appeals granted the motion filed by Grunder. Grunder then filed Buchanan's brief consistent with the scope of reference to the PSI requested in the motion.

The state then filed its own motion in the Court of Appeals, noting that the state's practice since State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915, has been to seek permission from the circuit court when it wants to cite a PSI in its appellate briefs. It further stated that the Court of Appeals' order granting Buchanan's motion gave the impression that

permission from the circuit court was not necessary. It then requested that it be allowed to examine and quote the PSI in the same manner as had been granted to Grunder.

In light of the state's motion, the Court of Appeals vacated its Nov. 30, 2011 order and now ordered Buchanan's counsel (SPD) and the state to file motions seeking permission from the circuit court.

The Court of Appeals asserts, in part, that the law is clear that such permission must be sought from the circuit court. It contends that the statement in Wis. Stat. § 972.15(2) that the circuit judge "shall disclose the contents of the report to the defendant's attorney and the district attorney prior to sentencing" means that the circuit court is the master of the PSI and that the parties are not automatically entitled to it.

The SPD's petition lists the following single issue:

Is post-conviction counsel required to first seek circuit court permission to "access, cite to, and quote from a PSI report" before litigating a PSI-related sentencing issue where: (1) by statute post-conviction counsel have a right to have and keep a copy of a PSI report; (2) due process requires that a defendant be permitted to challenge, deny or explain information in a PSI report; and (3) counsel must by operation of law and not circuit court permission or discretion keep the PSI report "confidential" as defined in Wis. Stat. § 809.81(8)?

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 6, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Monroe County Circuit Court decisions, Judge Michael J. McAlpine, presiding.

2009AP2432 Acuity v. Society Insurance

This case examines whether damages arising from faulty construction work performed by a contractor qualifies as an "occurrence" under the terms of a commercial general liability (CGL) insurance policy.

Some background: Ron Stoikes d/b/a RS Construction, and Terry Luethe d/b/a Flint's Construction, entered into an $8,500 contract with VPP Group LLC to remove and reinstall a concrete wall on the south side of a building containing VPP's engine room, which provided refrigeration and utility services to the company's animal processing plant.

VPP supplied all materials, and RS and Flint provided all labor. Work began in May 2006. RS shored up the engine room and removed the existing wall to grade level. The VPP processing plant continued at full operation during the phase of the work.

On June 12, 2006, during Flint's excavation of a trench adjacent to the south wall site, the soil began to erode from under the concrete slab of the first floor of the engine room. As a result, the engine room's first floor slab cracked and a portion deflected downward, as did a portion of the second floor and roof. The engine room's masonry walls adjacent to the south wall also sustained damage, disrupting utility service and reducing the plant's refrigeration capacity. As a result, VPP incurred costs of approximately $380,000.

VPP repaired the engine room by replacing the portion of the first floor concrete slab that had cracked, jacking up the second floor, and replacing portions of the roof slab. VPP contacted its insurer, Acuity, following the loss. Acuity paid a total of $636,466.39 to VPP in final settlement of the loss claims, including the $380,000 claimed for extra expenses and damages relating to the repair of the building, excluding costs to VPP related to replacing the south wall. Acuity commenced a subrogation action against RS, Flint, and their insurer, Society Insurance, seeking to recover damages arising from the engine room collapse.

The circuit court concluded the CGL policy did not provide coverage because there was no "occurrence." The Court of Appeals concluded the damages suffered by VPP were the result of an "occurrence." The Court of Appeals also concluded the economic loss doctrine did not bar coverage and that no business risk exception in the policy applied.

Society argues the Court of Appeals' decision is in direct conflict with a Court of Appeals decision in another case, Yeager v. Society Insurance (2010AP2733).

Society points out that in Yeager, the Court of Appeals held that faulty workmanship was not an "occurrence" and that the damage caused by the faulty workmanship could not itself be the "occurrence" while the Court of Appeals in this case came to the opposite conclusion. Society goes on to argue that the Court of Appeals' interpretation of Exclusions k.(5) and k.(6) was very narrow and in fact is contrary to the plain language of the exclusions.

Society asks the Supreme Court to review:

- if “faulty workmanship” is not an “occurrence” under a general liability insurance policy, then may an occurrence be found solely from the bad result caused by the faulty workmanship?
- if the exclusion, found in all general liability policies, precluding coverage for damage to property on which the insured is performing operations, limited solely to that specific property on which work is being done at the time of the property damage, or does the exclusion apply to all of the property within the insured’s control and responsibility?
- When a claim clearly falls within the economic loss doctrine, and therefore may only be brought as a breach of contract, and not a tort claim, is there insurance coverage under a standard general liability policy for the breach of contract claim?

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 6, 2012
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed Dane County Circuit Court decisions, Judge Daniel R. Moeser, presiding.

2011AP914 Est. of Hopgood v. Boyd

This case involves a claim against the state of Wisconsin arising from an accident involving a state-owned vehicle that was driven by a state prison inmate when it rolled over on the highway, resulting in the death of one passenger and injuring four others.

The Supreme Court examines what constitutes an oath for purposes of complying with Wis. Stat. § 893.82, which dictates the process and requirements for filing a claim against the state.

Essentially, the issue raised in the petition is whether the plaintiffs properly "swore to" the contents of their notices of claim and thereby strictly complied with § 893.82, Stats., and the requirements of Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

Some background: On June 17, 2009, Danny Hopgood, Perry Macon, Aaron Stroud, John Odom, Jr., and Michael Sensy were all passengers in a vehicle owned by the state of Wisconsin and being driven by Jimmy D. Boyd, then an inmate in the Wisconsin Prison System. Boyd lost control of the vehicle, which traveled off the roadway and rolled several times. All passengers were seriously injured and Hopgood died as the result of his injuries.

As required by § 893.82, Stats., the plaintiffs filed notices of claim with the state of Wisconsin within 120 days of the accident. All of the notices were notarized and contained an oath, swearing to the truth of the statements in the claims and acknowledging potential penalties for false swearing.

In lieu of filing an answer, Boyd filed a motion to dismiss. The motion argued, among other things, that the plaintiffs failed to strictly comply with § 893.82 because, although the body of the notices of claim contained a statement that an oath had been taken, the fact that the statement was within the body of the notice and not within the notary public's signature block, rendered the notices defective.

In opposing the motion, the plaintiffs argued that in Kellner, this court held that in order for a notice of claim to strictly comply with the statute, the notice must contain a formal oath or affirmation as to the truthfulness of the claim and a statement in the notice that the oath or affirmation occurred. The plaintiffs argued because their notices of claim contained all elements required by Kellner, the motion to dismiss should be denied.

Relying on Kellner and Newkirk v. Dept. of Transp., 228 Wis. 2d 830, 598 N.W.2d 610 (Ct. App. 1999), the circuit court held that in order to strictly comply with the statute, the notary public's signature block must contain an acknowledgment that an oath was taken and having such a statement in the body of the notice was not sufficient.

The plaintiffs filed a motion for reconsideration and clarification, arguing that there was no question but that the plaintiffs swore to the contents of their notices of claim. The circuit court heard oral argument on the motion for reconsideration and denied it. The plaintiffs appealed, and the Court of Appeals summarily affirmed.

The Court of Appeals said it was undisputed that each of the notices of claim contained a statement by the claimant that the notary who signed the notice had given the claimant an oral oath, and it was also undisputed that none of the notices of claim contained a statement by the notary who witnessed it that the notice was sworn to under oath.

The plaintiffs argue that the Court of Appeals' decision in Newkirk impermissibly extended the requirements established by this court in Kellner as to when a claim is properly "sworn to" for purposes of § 893.82(5).

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 6, 2012
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case had a practice in Milwaukee when his license was revoked.

2009AP284-D Office of Lawyer Regulation (OLR) v. Eisenberg

In this attorney disciplinary proceeding, Atty. Alan D. Eisenberg appeals from the report and recommendation of the referee, who concluded that Eisenberg had committed five separate violations of the Rules of Professional Conduct for Attorneys. The referee recommended that the previously imposed revocation of Eisenberg's license to practice law in Wisconsin should be extended for an additional period of two years.

Some background: In a prior disciplinary proceeding the Supreme Court revoked Eisenberg's license to practice law in Wisconsin, effective April 1, 2010, In re Disciplinary Proceedings Against Eisenberg, 2010 WI 11, 322 Wis. 2d 518, 778 N.W.2d 645 (Case No. 2007AP1083-D). Before that revocation order was issued, the OLR filed the complaint that started the current disciplinary proceeding.

The complaint against Eisenberg in the current case involves two separate matters. In the first matter, Eisenberg represented a man, T.H., concerning a pet dog that had been put to sleep. T.H. and his then-wife, S.H., owned the dog during their marriage. In early 1999 T.H. moved out of the couple's home, and they divorced in January 2000. Before, during, and after the divorce the dog lived with S.H. and the couple's children. As part of the divorce, the couple entered a marital settlement agreement (MSA) that provided that all of the personal property that was currently in the possession of S.H. would become her sole property and that T.H. was divested of any interest in that property.

T.H. subsequently learned that the dog, which he still viewed as his dog, had been put to sleep. Eisenberg agreed to represent T.H. and filed a complaint against S.H.'s mother, claiming that the wife's mother had taken the dog to an animal hospital and had ordered the dog's destruction. After the mother's attorney obtained a copy of the consent form showing that it had been signed by S.H., the circuit court dismissed T.H.'s complaint against his former mother-in-law and ordered both Eisenberg and T.H. to pay the mother-in-law's costs and attorney fees in the amount of $3,785.70. Eisenberg did not pay this sanction judgment until more than six years after it had been entered.

The referee in the current disciplinary case found that Eisenberg had knowingly advanced a frivolous factual position in the underlying civil case, in violation of SCR 20:3.1(a)(2). The referee also found that Eisenberg's conduct during T.H.'s deposition and in response to the mother-in-law's motion to compel had constituted a failure to comply with legally proper discovery requests, in violation of SCR 20:3.4(a) & (d). Finally, the referee concluded that

Eisenberg's long delay in paying the sanction judgment had constituted a knowing disobedience of a court order, in violation of SCR 20:3.4(c).

In a second matter, Eisenberg took over the representation of a claimant in a worker's compensation case. The client was allegedly brought to Eisenberg by an unlicensed medical doctor who had been working with the client at prior law firms. The referee found that at the time the client's claim was settled, Eisenberg sent a letter to the administrative law judge (ALJ) that informed the ALJ of Eisenberg's claim to a portion of the client's recovery as attorney fees and that stated Eisenberg had an agreement whereby he would split his fees on a 50/50 basis with the unlicensed doctor. When the OLR asked Eisenberg about the letter, he acknowledged that he may have signed the letter, but denied reading the letter prior to signing it and denied having a fee-splitting agreement with the doctor. He then sent a second letter to the ALJ that deleted the reference to a fee-splitting agreement with the doctor. In subsequent communications with the OLR, Eisenberg asserted that the original letter had never been sent to the ALJ. The original letter, bearing Eisenberg's signature, was produced by the ALJ at the evidentiary hearing in the disciplinary proceeding.

The referee concluded that Eisenberg had entered into a fee-splitting agreement with a non-lawyer, which violated SCR 20:5.4(a). The referee also found that Eisenberg's denials of having sent the original letter to the ALJ were false and that Eisenberg had therefore made a false statement to the OLR in the course of an investigation, in violation of SCR 22.03(6).

An attorney whose license has been revoked, like Eisenberg, may not petition for the reinstatement of his/her license until approximately five years after the date of the revocation. The referee in the present case recommended that Eisenberg's period of ineligibility to seek reinstatement should be extended for an additional period of two years.

In his appeal, Eisenberg contends that the charges against him should be dismissed. He asserts, among other things, that those charges are insubstantial and should not be the basis for any additional discipline. He also argues that the charges regarding the euthanasia of the dog occurred prior to the revocation of his license and therefore should not give rise to additional discipline beyond the existing revocation. Eisenberg further argues that the referee in the case was biased against him and should have been removed. Finally, Eisenberg objects to the OLR's request that he should be required to pay the costs of the disciplinary proceeding.

The Supreme Court will review the referee's factual findings and legal conclusions regarding the misconduct charges. If it affirms any of the referee's conclusions of professional misconduct, it will determine what would be the appropriate level of discipline.